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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. CC-11-1189-HKiMk  
HUMBERTO CEDANO, )  
Debtor. ) Adv. No. SV 10-01534 GM

HUMBERTO CEDANO,  
Appellant,

v.

O P I N I O N

AURORA LOAN SERVICES, LLC;  
DEUTSCHE BANK TRUST COMPANY  
AMERICAS; THE RALI SERIES  
2007-QH8 TRUST; SCME MORTGAGE  
BANKERS, INC.; MORTGAGE  
ELECTRONIC REGISTRATION  
SYSTEMS, INC.; CAL-WESTERN  
RECONVEYANCE CORP.,  
Appellees.

Argued and Submitted on February 24, 2012  
at Pasadena, California

Filed - April 9, 2012  
Ordered Published - April 17, 2012

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Geraldine Mund, Bankruptcy Judge, Presiding

Appearances: Richard Tobin Baum argued for Appellant Humberto  
Cedano. Justin Donald Balser, of Akerman  
Senterfitt LLP, argued for Appellees Mortgage  
Electronic Registration Systems, Inc.; Deutsche  
Bank Trust Company Americas; Aurora Loan Services  
LLC; and The RALI Series 2007-QH8 Trust.

Before: HOLLOWELL, KIRSCHER, and MARKELL, Bankruptcy Judges.

1 HOLLOWELL, Bankruptcy Judge:  
2

3 This appeal challenges the bankruptcy court's dismissal,  
4 pursuant to Civil Rule 12(b)(6),<sup>1</sup> of the debtor's adversary  
5 proceeding alleging wrongful foreclosure of his residence,  
6 slander of title, professional negligence by the foreclosing  
7 trustee in failing to ascertain the validity of the underlying  
8 loan documents, and seeking cancellation of the trustee's deed  
9 upon sale and to quiet title. We AFFIRM.

10 **I. FACTS**

11 A. Background

12 On January 25, 2007, the Debtor executed a \$444,000  
13 promissory note in favor of SCME Mortgage Bankers, Inc. (SCME)  
14 (the Note). The Note was secured by a deed of trust (DOT) on the  
15 Debtor's residence in Canoga Park, California (the Property).  
16 The DOT named Stewart Title of San Diego (Stewart Title) as the  
17 trustee, and Mortgage Electronic Registration Systems (MERS) as  
18 beneficiary and nominee for SCME as the lender, the lender's  
19 successors and assigns. By the terms of the DOT, MERS could  
20 exercise the rights granted to the lender (and the lender's  
21 successors and assigns), including the right to foreclose on the  
22 Property. Additionally, the DOT allowed MERS to appoint a  
23 successor trustee. The Note and DOT were recorded February 7,  
24 2007. The Note was endorsed in blank by SCME.

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25  
26 <sup>1</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
28 The Federal Rules of Bankruptcy Procedure, Rules 1001-9037, are  
referred to as "Rules." The Federal Rules of Civil Procedure are  
referred to as "Civil Rules."

1 SCME subsequently assigned the Note to Rali Series 2007-QH8  
2 Trust (Rali Trust) as part of a securitization process, which  
3 included a Pooling and Servicing Agreement (PSA). Deutsche Bank  
4 Trust Company (Deutsche Bank) is the trustee of the Rali Trust.<sup>2</sup>  
5 Aurora Loan Services LLC (Aurora), servicer for Deutsche Bank,  
6 replaced Homecomings Financial, LLC as the servicer of the Note  
7 in May 2008.

8 On August 13, 2009, MERS executed a Substitution of Trustee  
9 to substitute Cal-Western Reconveyance Corporation (Cal-Western)  
10 as the trustee under the DOT. The Substitution of Trustee was  
11 subsequently recorded on September 28, 2009. Before the  
12 Substitution of Trustee was recorded, on August 18, 2009, Cal-  
13 Western executed a Notice of Default and Election to Sell Under  
14 Deed of Trust (NOD); the NOD was recorded the following day. In  
15 the NOD, Cal-Western identified itself as the trustee, duly  
16 appointed substituted trustee, or agent for MERS as the  
17 beneficiary of the DOT.

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19 <sup>2</sup> It is not clear from the facts in the record whether the  
20 Note was actually included in the Rali Trust. There is no  
21 assignment of the Note from SCME to Deutsche Bank included in the  
22 record. The Debtor contends that the Note was never perfected  
23 into the PSA and it is, therefore, "unlikely that this Trust ever  
24 became the owner of [the Note] or Deutsche was properly  
25 authorized to act as trustee."

26 However, because the Note was endorsed in blank, it is a  
27 bearer instrument. Cal. Comm. Code § 3205(b); In re Aniel,  
28 427 B.R. 811, 815-16 (Bankr. N.D. Cal. 2010). Therefore, whoever  
has possession may enforce the Note. Cal. Comm. Code  
§ 1201(b)(21); (b)(5). Again, the record provides no information  
about who held the Note when nonjudicial foreclosure proceedings  
were commenced, but as explained later in this memorandum,  
whoever held the Note is not material to deciding the issues on  
appeal.

1 The Debtor was directed to contact MERS c/o Cal-Western to  
2 find out the payoff amount or to make arrangements to stop the  
3 foreclosure. Additionally, the NOD provided that:

4 the mortgagee, beneficiary or authorized agent for the  
5 mortgagee or beneficiary pursuant to California Civil  
6 Code § 2923.5(b) declares that the mortgagee,  
7 beneficiary or the mortgagee's or beneficiary's  
authorized agent has either contacted the borrower or  
tried with due diligence to contact the borrower as  
required by California Civil Code § 2923.5.

8 Cal-Western recorded a Notice of Trustee's Sale on  
9 November 20, 2009, notifying the Debtor that the Property would  
10 be subject to a public auction scheduled for December 10, 2009  
11 (Notice of Sale).

12 In December 2009, Aurora and the Debtor entered into a loan  
13 modification agreement for a trial period, which suspended the  
14 foreclosure sale. However, after the trial period ended, Aurora  
15 terminated the loan modification agreement. The foreclosure of  
16 the Property occurred on July 13, 2010. Aurora was the  
17 successful bidder at the public auction. The Debtor filed for  
18 chapter 13 relief on July 15, 2010. Aurora obtained retroactive  
19 relief from stay to validate the recording of the sale of the  
20 Property. On July 29, 2010, Cal-Western executed the Trustee's  
21 Deed Upon Sale and conveyed the Property to Aurora.

22 B. The Adversary Proceeding

23 On December 10, 2010, the Debtor initiated an adversary  
24 proceeding by filing a complaint (Complaint) against Aurora,  
25 Deutsche Bank, the Rali Trust, SCME, MERS and Cal-Western  
26 (collectively, the Defendants) alleging six causes of action:

27 (1) wrongful foreclosure, asserting that none of the  
28 Defendants were "persons entitled to enforce" the Note and  
therefore, had no right under Cal. Comm. Code § 3301 or Cal. Civ.

1 Code § 2924 to declare a default or to foreclose on the Property;  
2 and, furthermore, that MERS and Cal-Western failed to comply with  
3 procedural requirements, including Cal. Civ. Code § 2923.5, for  
4 initiating the foreclosure;

5 (2) cancellation of the NOD, Substitution of Trustee, Notice  
6 of Sale, and Trustee's Deed Upon Sale based on MERS' and Cal-  
7 Western's lack of authority to initiate the foreclosure process;

8 (3) slander of title based on the Defendants' wrongful  
9 recording of the NOD, Notice of Sale and Trustee's Deed Upon  
10 Sale, and wrongful foreclosure;

11 (4) quiet title of the Property as to the Debtor and against  
12 the claims of Aurora to the Property;

13 (5) breach of contract based on Aurora's termination of the  
14 loan modification agreement;

15 (6) professional negligence against Cal-Western for its  
16 failure to ascertain the validity of the foreclosure documents to  
17 protect the trustor's interest.

18 On January 13, 2011, Cal-Western filed a motion to dismiss  
19 the Complaint for failure to state a claim upon which relief  
20 could be granted. Cal-Western asserted there was no merit to  
21 claims (1)-(4) and (6) because Cal-Western and the other  
22 Defendants complied with applicable California law in conducting  
23 the foreclosure sale and because the Debtor failed to allege an  
24 ability or willingness to tender the amount of his indebtedness.  
25 Additionally, Cal-Western argued that the Debtor did not have  
26 standing to assert his breach of contract claim.

27 On February 2, 2011, Aurora, Deutsche Bank, and MERS also  
28 filed a motion to dismiss for failure to state a claim. Like  
29 Cal-Western, Aurora, Deutsche Bank and MERS asserted that the  
30 Debtor's claims failed because the foreclosure complied with  
31 applicable California law.

32 The bankruptcy court issued a tentative ruling prior to a  
33 hearing on the motions to dismiss (Tentative Ruling). In its

1 Tentative Ruling, the bankruptcy court determined that the Debtor  
2 failed to state a wrongful foreclosure cause of action because  
3 the allegations and documents demonstrated that the foreclosure  
4 was initiated by parties entitled to do so under the terms of the  
5 DOT and consistent with California's nonjudicial foreclosure  
6 statute, Cal. Civ. Code § 2924.

7 Nevertheless, the bankruptcy court did find that the Debtor  
8 alleged sufficient facts to support a claim that the Defendants  
9 failed to contact him prior to foreclosure as required under Cal.  
10 Civ. Code § 2923.5. In reaching its decision, the bankruptcy  
11 court rejected the position, set forth by other California  
12 courts, that once a foreclosure sale has occurred, a violation of  
13 Cal. Civ. Code § 2923.5 is not actionable. Furthermore, the  
14 bankruptcy court determined that the Debtor did not need to  
15 establish tender to support a claim under Cal. Civ. Code  
16 § 2923.5. The bankruptcy court determined that the Debtor  
17 alleged sufficient facts to state a cause of action to cancel the  
18 Trustee Deed Upon Sale and other instruments based on its  
19 conclusion that the Debtor's Cal. Civ. Code § 2923.5 claim was  
20 viable.

21 Also in its Tentative Ruling, the bankruptcy court found  
22 that the Debtor failed to plead all the elements required to  
23 state a cause of action for slander of title or to quiet title,  
24 and therefore, dismissed those claims with leave to amend. The  
25 bankruptcy court dismissed the Debtor's breach of contract claim  
26 with prejudice, holding that there was no private right of action  
27 under the Home Affordable Modification Program (HAMP). Finally,  
28 the bankruptcy court found that the Debtor stated a sufficient

1 claim for professional negligence, again on the basis that the  
2 Debtor sufficiently alleged a claim under Cal. Civ. Code  
3 § 2923.5.

4 The bankruptcy court held a hearing on the motions to  
5 dismiss on March 9, 2011. At the hearing, the Debtor pressed the  
6 arguments, made in his Complaint and briefs, that the Defendants  
7 were not entitled to foreclose on the Property. At the close of  
8 the hearing, the bankruptcy court announced its decision as  
9 outlined in the Tentative Ruling. It allowed the Debtor leave to  
10 amend but gave the Debtor the option to elect not to amend the  
11 Complaint and have a final judgment of dismissal for purposes of  
12 appeal.

13 On April 8, 2011, the bankruptcy court entered an order  
14 granting in part the Defendants' motions to dismiss and allowing  
15 the Debtor to amend the Complaint. On April 9, 2011, the Debtor  
16 filed a notice of his election to not amend the Complaint.  
17 Thereafter, on April 18, 2011, the bankruptcy court entered a  
18 Judgment of Dismissal dismissing the adversary proceeding with  
19 prejudice. The Debtor timely appealed.

## 20 **II. ISSUE**

21 Did the bankruptcy court err in dismissing the Complaint  
22 under Civil Rule 12(b)(6)?

## 23 **III. JURISDICTION**

24 The bankruptcy court had jurisdiction under 28 U.S.C.  
25 § 157(b)(2)(A) and § 1334. We have jurisdiction under 28 U.S.C.  
26 § 158.

## 27 **IV. STANDARDS OF REVIEW**

28 We review de novo the dismissal of a complaint for failure

1 to state a claim under Civil Rule 12(b)(6). Ta Chong Bank Ltd.  
2 v. Hitachi High Techs. Am., Inc., 610 F.3d 1063, 1066 (9th Cir.  
3 2010). De novo review means we will look at the case "anew, the  
4 same as if it had not been heard before, and as if no decision  
5 previously had been rendered," and giving no deference to the  
6 bankruptcy court's determinations. McComish v. Bennett, 611 F.3d  
7 510, 519 (9th Cir. 2010).

## 8 **V. DISCUSSION**

### 9 A. Standards For Dismissal

10 Under Civil Rule 12(b)(6) (made applicable by Rule 7012), a  
11 court must dismiss a complaint if it fails to "state a claim upon  
12 which relief can be granted." In reviewing a Civil Rule 12(b)(6)  
13 dismissal, we accept as true all facts alleged in the complaint  
14 and draw all reasonable inferences in favor of the plaintiff.  
15 Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir. 2011); Newcal  
16 Indus., Inc. v. Ikon Office Solutions, 513 F.3d 1038, 1043 n.2  
17 (9th Cir. 2008). However, the court need not accept as true  
18 conclusory allegations or legal characterizations cast in the  
19 form of factual allegations. Bell Atl. Corp. v. Twombly,  
20 550 U.S. 544, 555-56 (2007); Warren v. Fox Family Worldwide,  
21 Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). While the court  
22 generally must not consider materials outside the complaint, the  
23 court may consider exhibits submitted with the complaint.  
24 Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir.  
25 1987).

26 To avoid dismissal under Civil Rule 12(b)(6), a plaintiff  
27 must aver in his complaint "sufficient factual matter, accepted  
28 as true, to 'state a claim to relief that is plausible on its

1 face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937,  
2 1949 (2009) quoting Twombly, 550 U.S. at 570 (A claim survives  
3 Civil Rule 12(b)(6) when it is "plausible."). It is axiomatic  
4 that a claim cannot be plausible when it has no legal basis. A  
5 dismissal under Civil Rule 12(b)(6) may be based on the lack of a  
6 cognizable legal theory or on the absence of sufficient facts  
7 alleged under a cognizable legal theory. Johnson v. Riverside  
8 Healthcare Sys., LP, 534 F.3d 1116, 1121 (9th Cir. 2008).

9 B. Wrongful Foreclosure

10 The Debtor's first cause of action alleged that the  
11 Defendants wrongfully foreclosed on the Property for two reasons.  
12 First, he alleged the foreclosure was initiated by parties who  
13 neither had an interest in the Note nor were authorized by the  
14 holders of the Note to undertake foreclosure. Specifically, the  
15 Debtor alleged that after the Note was transferred and  
16 securitized into the Rali Trust, SCME and MERS had no further  
17 authority to act under the DOT because they no longer had any  
18 interest in the Note or DOT.

19 Second, the Debtor alleged the foreclosure was improper  
20 because Cal-Western failed to comply with Cal. Civ. Code  
21 § 2923.5, which requires a lender to contact a borrower prior to  
22 filing a notice of default in order to assess the borrower's  
23 financial situation and explore options to avoid foreclosure.  
24 For the reasons explained below, we conclude that the Debtor's  
25 allegations failed to establish a cause of action for wrongful  
26 foreclosure.

27 1. Tender

28 The Defendants argue that the Debtor's wrongful foreclosure

1 cause of action necessarily failed because the Debtor did not  
2 allege that he had the ability to tender. A tender is "an offer  
3 of performance made with the intent to extinguish the  
4 obligation." Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d  
5 1051, 1059 (E.D. Cal. 2010) (internal citations omitted).

6 California courts have held that a defaulted borrower is  
7 required to allege tender of the amount of the lender's secured  
8 indebtedness in order to maintain a cause of action for  
9 irregularity in the sale procedure. Id.; see also Lona v.  
10 Citibank, N.A., 202 Cal. App. 4th 89, 112 (Cal. Ct. App. 2011)  
11 (offer of tender is condition precedent to action to set aside  
12 trustee's sale); Alicea v. GE Money Bank, 2009 WL 2136969, at \*3  
13 (N.D. Cal. Jul. 16, 2009) (tender essential to cancel voidable  
14 sale); Arnolds Mgmt. Corp. v. Eischen, 158 Cal. App. 3d 575, 579  
15 (Cal. Ct. App. 1984) ("A cause of action 'implicity integrated'  
16 with the irregular sale fails unless the trustor can allege and  
17 establish a valid tender."); Karlsen v. Am. Sav. & Loan Ass'n, 15  
18 Cal. App. 3d 112, 117 (Cal. Ct. App. 1971) (valid and viable  
19 tender essential to action to cancel voidable sale under a deed  
20 of trust).

21 Nevertheless, there are a few recognized exceptions to the  
22 tender requirement. For example, if the borrower's action  
23 attacks the validity of the underlying debt, then tender is not  
24 required because it would constitute an affirmation of the debt.  
25 Lona, 202 Cal. App. 4th at 112-113. Additionally, there is a  
26 general equitable exception that "tender may not be required  
27 where it would be inequitable to do so." Sacchi v. Mortg.  
28 Electr. Registration Sys., Inc., 2011 WL 2533029, at \*10 (C.D.

1 Cal. June 24, 2011) (citing Onofrio v. Rice, 55 Cal. App. 4th  
2 413, 424 (Cal. Ct. App. 1997)). Furthermore, tender is not  
3 required when the trustor does not rely on equity to attack the  
4 deed, such as, where the trustee's deed is void on its face.  
5 Lona, 202 Cal. App. 4th at 113; see also Dimock v. Emerald Props.  
6 LLC, 81 Cal. App. 4th 868, 878 (Cal. Ct. App. 2000) (sale under  
7 the deed of trust by a former trustee was facially void, and  
8 therefore tender was not required to sustain a cause of action).

9 The Complaint alleged that "[a]lthough the Trustee's Deed  
10 Upon Sale appears valid on its face, it is invalid and void"  
11 because the foreclosure was not authorized by the beneficiary of  
12 the Note and DOT. Although "void," "voidable," and "invalid" are  
13 often used interchangeably, the "general rule" is that defects  
14 and irregularities in a sale render it merely voidable and not  
15 void.<sup>3</sup> Little, 188 Cal. App. 3d at 1358. However, substantially  
16 defective sales have been held to be void. Id. We must accept  
17 facts and reasonable inferences in favor of the Debtor. Maya,  
18 658 F.3d at 1068. Therefore, to the extent the Debtor alleged  
19 that the foreclosure was substantially defective because  
20 unauthorized persons initiated the procedure, rendering the sale  
21 void, he has met one of the exceptions to the requirement of  
22 tender. Accordingly, we address whether the Debtor has otherwise  
23 stated a claim for wrongful foreclosure.

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24  
25  
26 <sup>3</sup> "Void" means to have no legal or binding force; whereas,  
27 "voidable" is defined as "that which may be avoided, or declared  
28 void." Little v. CFS Serv. Corp., 188 Cal. App. 3d 1354, 1358  
(Cal. Ct. App. 1987) (internal citations omitted). Something is  
"invalid" when it has no binding force or legal effect. Id.

1           2.    Authorization To Foreclose

2           The Debtor claims that the foreclosure was improper because  
3 the Defendants failed to demonstrate they were "persons entitled  
4 to enforce" the Note pursuant to Cal. Comm. Code § 3301.  
5 Specifically, the Debtor alleged that Cal-Western did not have  
6 the authority to initiate the foreclosure because: (1) there was  
7 no evidence that MERS was appointed as a nominee by the holder of  
8 the Note prior to the execution of the Substitution of Trustee;  
9 or (2) that the current holder of the Note authorized MERS and/or  
10 Cal-Western to proceed with the foreclosure.

11           However, in the context of nonjudicial foreclosure sales,  
12 such as here, the Debtor's reliance on Cal. Comm. Code § 3301 is  
13 misplaced. Gardner v. Am. Home Mortg. Servicing, Inc., 691 F.  
14 Supp. 2d 1192, 1202 (E.D. Cal. 2010); Padayachi v. IndyMac Bank,  
15 2010 WL 4367221, at \*3 (N.D. Cal. Oct. 28, 2010); Castaneda v.  
16 Saxon Mortg. Servs., Inc., 687 F. Supp. 2d 1191, 1201 (E.D. Cal.  
17 2009). Nonjudicial foreclosure sales are governed by Cal. Civ.  
18 Code § 2924. Castaneda, 687 F. Supp. 2d at 1201; Moeller v.  
19 Lien, 25 Cal. App. 4th 822, 834 (Cal. Ct. App. 1994); see also  
20 Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal), 450 B.R.  
21 897, 917 n.34 (9th Cir. BAP 2011) (noting state law may shape the  
22 boundaries of "real party in interest" status and collecting  
23 cases where California law gives parties the right to foreclose  
24 without interest in the note). California's nonjudicial  
25 foreclosure statute provides a "comprehensive framework for the  
26 regulation of a nonjudicial foreclosure sale pursuant to a power  
27 of sale contained in a deed of trust." Lona, 202 Cal. App. 4th  
28 at 101; Moeller, 25 Cal. App. 4th at 834 (comprehensive statutory

1 framework intended to be exhaustive).

2 Under Cal. Civ. Code § 2924, the party initiating  
3 foreclosure proceedings is not required to have a beneficial or  
4 economic interest in the note in order to foreclose. Lane v.  
5 Vitek Real Estate Indus. Grp., 713 F. Supp. 2d 1092, 1099 (E.D.  
6 Cal. 2010); Castaneda, 687 F. Supp. 2d at 1201 (no requirement  
7 that person or entity initiating foreclosure has physical  
8 possession of the underlying note); Candelo v. NDex W., LLC, 2008  
9 WL 5382259, at \*4 (E.D. Cal. Dec. 23, 2008) (same). Instead, a  
10 "trustee, mortgagee, or beneficiary, or any of their authorized  
11 agents" may commence the nonjudicial foreclosure process. Cal.  
12 Civ. Code § 2924(a)(1).

13 The Debtor's Complaint and exhibits indicate that the DOT  
14 designated MERS as the nominal beneficiary for the lender and the  
15 lender's successor's and assigns. The terms of the DOT expressly  
16 provided MERS with the right to exercise any or all of the  
17 lender's, or the lender's successors' and assigns', rights  
18 including the right to foreclose and sell the Property.  
19 Additionally, the allegations and documents provided with the  
20 Complaint demonstrate that MERS executed a Substitution of  
21 Trustee substituting Cal-Western as the trustee under the DOT,  
22 which was recorded prior to the sale. Finally, the Complaint and  
23 exhibits demonstrate that Cal-Western initiated the nonjudicial  
24 foreclosure process by recording the NOD. On the NOD, Cal-  
25 Western identified itself as "the trustee, the duly appointed  
26 substituted trustee or an agent acting for the trustee or  
27 beneficiary" under the DOT.

28

1 a) MERS

2 The allegations and documents establish MERS's authority to  
3 foreclose on the Property. As the beneficial nominee for the  
4 original lender and the lender's successors and assigns, MERS was  
5 an authorized agent of the lender. As one court explained:

6 MERS facilitates the transfer of mortgage interests by  
7 providing an electronic tracking system for the  
8 mortgage interests registered in its system. To do  
9 this, MERS is the beneficiary of record in a "nominee"  
10 capacity for the mortgage lender on all security  
11 instruments in its system. When the lender assigns its  
12 beneficial interest to another entity within MERS's  
electronic system, MERS remains the beneficiary of  
record for that instrument by serving as nominee for  
the new beneficial interest holder. MERS remains the  
beneficiary of record on the Deed of Trust or mortgage  
even as the beneficial interest is assigned repeatedly  
within MERS's electronic system.

13 Castaneda, 687 F. Supp. 2d at 1195; see also, Gomes v.  
14 Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149, 1151 (Cal.  
15 Ct. App. 2011) (further explaining the MERS system). Therefore,  
16 the transfer of the Note as part of a securitization process did  
17 not affect MERS's right as a nominee under the DOT. Gomes, 192  
18 Cal. App. 4th at 1157-58; Morgera v. Countrywide Home Loans,  
19 Inc., 2010 WL 160348, at \*8 (E.D. Cal. Jan. 11, 2010) (collecting  
20 cases). MERS was the nominee under the DOT even after SCME  
21 transferred the Note.

22 The Debtor has not alleged facts that demonstrated MERS was  
23 not authorized to initiate foreclosure proceedings. Rather, he  
24 argued only that MERS may not have been authorized since MERS did  
25 not submit evidence that it was acting on behalf of whomever was  
26 the holder of the Note. However, as a California court recently  
27 held, Cal. Civ. Code § 2924 "does not provide for a judicial  
28 action" when the issue is not whether the wrong entity initiated

1 foreclosure but whether the entity was merely authorized to do so  
2 by the owner of the note. Gomes, 192 Cal. App. 4th at 1155-56  
3 ("California's nonjudicial foreclosure law does not provide for  
4 the filing of a lawsuit to determine whether MERS has been  
5 authorized by the holder of the Note to initiate a  
6 foreclosure."); Cruz v. Aurora Loan Servs. LLC (In re Cruz),  
7 457 B.R. 806, 813 (Bankr. S.D. Cal. 2011). As the Gomes court  
8 noted, nonjudicial foreclosure proceedings are intended to be  
9 less expensive and more quickly concluded, therefore "[t]he  
10 recognition of the right to bring a lawsuit to determine a  
11 nominee's authorization to proceed with foreclosure on behalf of  
12 the noteholder would fundamentally undermine the nonjudicial  
13 nature of the process and introduce the possibility of lawsuits  
14 filed solely for the purpose of delaying valid foreclosures."  
15 Gomes, 192 Cal. App. 4th at 1155.

16 Furthermore, the Debtor agreed, by executing the Deed of  
17 Trust, that MERS had the authority to foreclose on the Property.  
18 See id. at 1157 (borrower's agreement that MERS has the authority  
19 to foreclose precludes a cause of action premised on the  
20 allegation that MERS does not have the authority to do so);  
21 Bascos v. Fed. Home Loan Mortg. Corp., 2011 WL 3157063, at \*4  
22 (C.D. Cal. July 22, 2011) (same).

23 b) Cal-Western

24 The nonjudicial foreclosure process in California is  
25 commenced by the recording of a notice of default and election to  
26 sell. Here, Cal-Western commenced the process by recording the  
27 NOD. "[A]n agent for the mortgagee or beneficiary, an agent of  
28 the named trustee, any person designated in an executed

1 substitution of trustee, or an agent of that substituted trustee”  
2 is authorized to record the notice of default or the notice of  
3 sale. Cal. Civ. Code § 2924b(b) (4) (emphasis added).

4 Numerous cases have held that, as the nominee for the lender  
5 under a deed of trust, MERS has authority to substitute a  
6 trustee. In re Cruz, 457 B.R. at 813; Bascos, 2011 WL 3157063,  
7 at \*5; Lawther v. Onewest Bank, 2010 WL 4936797, at \*6 (N.D. Cal.  
8 Nov. 30, 2010) (“Courts in this Circuit have repeatedly  
9 recognized that MERS, as a named nominal beneficiary to a Deed of  
10 Trust, has the power to make assignments and substitutions under  
11 California’s statutory foreclosure scheme.”). Accordingly, MERS  
12 had the authority to substitute Cal-Western as the trustee under  
13 the DOT and the documents submitted with the Complaint  
14 established Cal-Western’s right to initiate the nonjudicial  
15 foreclosure process. See, e.g., Putkkuri v. Recontrust Co.,  
16 2009 WL 32567, at \*2 (S.D. Cal. Jan. 5, 2009) (the trustee of a  
17 deed of trust has the right to initiate the foreclosure process).

18 Nevertheless, the Debtor alleged that Cal-Western was not  
19 authorized to file the NOD because the Substitution of Trustee  
20 was not recorded when Cal-Western filed the NOD. But, there is  
21 no requirement that the Substitution of Trustee be recorded, only  
22 that it be executed. Cal. Civ. Code § 2924b(b) (4); Padayachi,  
23 2010 WL 4367221, at \*3. Here, the Substitution of Trustee was  
24 executed prior to the NOD, authorizing Cal-Western to initiate  
25 the foreclosure.

26 3. Compliance With Cal. Civ. Code § 2923.5

27 As part of the Debtor’s claim for wrongful foreclosure, he  
28 alleged that Cal-Western failed to satisfy Cal. Civ. Code

1 § 2923.5 because Cal-Western failed to contact him to assess his  
2 financial situation and explore options to avoid foreclosure.  
3 Cal. Civ. Code § 2923.5(b) requires a notice of default to  
4 include a declaration "from the mortgagee, beneficiary, or  
5 authorized agent" of compliance, including that there was an  
6 attempt "with due diligence to contact the borrower."

7 The NOD included the necessary declaration to satisfy Cal.  
8 Civ. Code § 2923.5(b). Nevertheless, the Debtor alleged that the  
9 declaration was deficient because it contained boilerplate  
10 language and was not made under penalty of perjury. However, the  
11 language of the declaration may track the statute and there is no  
12 requirement that it be made under penalty of perjury. Mabry v.  
13 Superior Court, 185 Cal. App. 4th 208, 233 (Cal. Ct. App. 2010).

14 The Debtor alleged that he was not contacted by the  
15 Defendants prior to the filing of the NOD. The Debtor also  
16 alleged that he and Aurora agreed to a modification of the loan  
17 terms, which forestalled the scheduled foreclosure. The  
18 statements are difficult to reconcile.

19 Even if the facts alleged are taken as true and the Debtor  
20 sufficiently established a claim for violation of Cal. Civ. Code  
21 § 2923.5, it does not follow, as the Debtor asserts, that the  
22 Trustee's Deed Upon Sale is void. Bascos, 2011 WL 3157063, at  
23 \*5. The sole remedy for a failure to comply with Cal. Civ. Code  
24 § 2923.5 is "limited to postponement of an impending  
25 foreclosure."<sup>4</sup> Nguyen v. Bank of Am., Nat'l Ass'n, 2011 WL

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27 <sup>4</sup> We disagree with the bankruptcy court that a failure to  
28 satisfy this section could possibly result in setting aside the

(continued...)

1 5574917, at \*8 (N.D. Cal. Nov. 15, 2011); Bascos, 2011 WL  
2 3157063, at \*6; Hamilton v. Greenwich Investors XXVI, LLC, 195  
3 Cal. App. 4th 1602, 1616 (Cal. Ct. App. 2011). Because the  
4 foreclosure sale has already occurred, there is no remedy  
5 available to the Debtor. Stebley, 202 Cal. App. 4th at 526 (Cal.  
6 Civ. Code § 2923.5 does not provide for damages or for setting  
7 aside a foreclosure sale.). Consequently, the Debtor has failed  
8 to state a claim for relief under Cal. Civ. Code § 2923.5. In  
9 summary, the Debtor was unable to allege facts sufficient to  
10 pursue a cause of action for wrongful foreclosure.

11 C. Cancellation Of Documents

12 In his second cause of action, the Debtor alleged that the  
13 NOD was invalid, and therefore, the events that followed, such as  
14 the Notice of Sale and the Trustee's Deed Upon Sale were also  
15 invalid. He sought cancellation of the documents under Cal. Civ.  
16 Code § 3412.

17 "A written instrument, in respect to which there is a  
18 reasonable apprehension that if left outstanding it may cause  
19 serious injury to a person against whom it is void or voidable,  
20

21 \_\_\_\_\_  
22 <sup>4</sup>(...continued)  
23 foreclosure absent an allegation of tender. The exceptions to  
24 tender do not apply when there are allegations of mere procedural  
25 defects in foreclosure sale proceedings.

26 Some courts have held that tendering the indebtedness prior  
27 to the enforcement of the right under Cal. Civ. Code § 2923.5 is  
28 contradictory and would "thwart the very operation of the  
statute." Sacchi, 2011 WL 2533029, at \*10; Mabry, 185 Cal. App.  
4th at 225. Those cases held that tender was not required to  
delay a sale; they did not suggest that tender would not be  
required post-sale. See Stebley v. Litton Loan Servicing, LLP,  
202 Cal. App. 4th 522, 526 (Cal. Ct. App. 2011).

1 may . . . [be] canceled." Cal. Civ. Code § 3412; Nguyen, 2011 WL  
2 5574917, at \*5. To support his claim, the Debtor reiterated his  
3 allegations that MERS and Cal-Western were not authorized to  
4 initiate foreclosure, making the instruments void. However, as  
5 we determined above, the Debtor failed to sufficiently allege  
6 facts demonstrating that MERS and Cal-Western were not authorized  
7 to foreclose on the Property. Moreover, a defect in the NOD does  
8 not corrupt all subsequent steps in the nonjudicial foreclosure  
9 proceeding such that the sale is void.

10 D. Slander Of Title

11 Slander of title is a "tortious injury to property resulting  
12 from unprivileged, false, malicious publication of disparaging  
13 statements regarding the title to property owned by plaintiff, to  
14 plaintiff's damage." Southcott v. Pioneer Title Co., 203 Cal.  
15 App. 2d 673, 676 (Cal. Ct. App. 1962). "'The recordation of an  
16 instrument facially valid but without underlying merit will give  
17 rise to an action for slander of title.'" Nguyen, 2011 WL  
18 5574917, at \*7 (citing Stamas v. County of Madera, 2011 WL  
19 2433633, at \*14 (E.D. Cal. June 14, 2011)). To establish a claim  
20 for slander of title, a plaintiff must establish: (1)  
21 publication, (2) absence of justification, (3) falsity, and (4)  
22 direct pecuniary loss. Id.

23 The Debtor alleged that the NOD, the Notice of Sale and the  
24 Trustee's Deed Upon Sale were invalid and constituted improper  
25 clouds on the Debtor's title to the Property. The Debtor alleged  
26 that the Defendants wrongfully recorded these documents in  
27 violation of California law. Because the Debtor's slander of  
28 title claim was based on the same facts relied on in his first

1 two causes of action, he has failed to establish the falsity of  
2 the NOD, Substitution of Trustee, Notice of Sale and Trustee's  
3 Deed Upon Sale. Consequently, the Debtor failed to establish the  
4 third element of his slander of title claim and the bankruptcy  
5 court did not err in dismissing the Debtor's third cause of  
6 action.

7 E. Quiet Title

8 To state a cause of action to quiet title under California  
9 law, a plaintiff must allege:

10 (a) A description of the property that is the subject  
11 of the action. . . . In the case of real property, the  
12 description shall include both its legal description  
and its street address or common designation, if any.

13 (b) The title of the plaintiff as to which a  
14 determination under this chapter is sought and the  
basis of the title. . . .

15 (c) The adverse claims to the title of the plaintiff  
against which a determination is sought.

16 (d) The date as of which the determination is sought.  
17 If the determination is sought as of a date other than  
18 the date the complaint is filed, the complaint shall  
include a statement of the reasons why a determination  
as of that date is sought.

19 (e) A prayer for the determination of the title of the  
20 plaintiff against the adverse claims.

21 Cal. Civ. Proc. Code § 761.020.

22 The Debtor pled each of these requirements in the Complaint;  
23 however, we must also determine whether he pled facts sufficient  
24 to allow us to draw a reasonable inference that he was entitled  
25 to relief under his quiet title claim. See Iqbal, 556 U.S. at  
26 678, 129 S. Ct. at 1949.

27 The plausibility of the Debtor's quiet title claim depended  
28 on the viability of his allegation that neither MERS nor Cal-

1 Western were authorized to foreclose on the Property. Because we  
2 have determined that the allegations and supporting documents in  
3 the Complaint did not support a claim for wrongful foreclosure,  
4 the quiet title claim is fatally defective. Accordingly, we  
5 conclude that the bankruptcy court properly dismissed the  
6 Debtor's quiet title cause of action.

7 F. Breach Of Contract

8 The Debtor has abandoned his claim for breach of contract.  
9 Appellant's Opening Br. at 5-6, 7. Therefore, we need not decide  
10 whether the bankruptcy court erred in dismissing the fifth cause  
11 of action alleged in the Complaint.

12 G. Professional Negligence

13 In order to state a claim for negligence, the Debtor was  
14 required to allege that (1) the defendant had a legal duty to use  
15 due care; (2) the defendant breached that duty; and, (3) the  
16 breach was the proximate or legal cause of the resulting injury.  
17 Bascos, 2011 WL 3157063, at \*7. The Debtor alleged that Cal-  
18 Western breached its duty to him by failing to ascertain the  
19 validity of the foreclosure documents, which resulted in the  
20 wrongful foreclosure of the Property.

21 A trustee under a deed of trust is not a true trustee that  
22 owes fiduciary duties to the trustor. Lopez v. GMAC Mortg.,  
23 2011 WL 6029875, at \*13 (E.D. Cal. Dec. 5, 2011). Indeed, "a  
24 trustee under a deed of trust owes Plaintiff no duty beyond its  
25 duties contained in Cal. Civ. Code [§] 2924." Bascos, 2011 WL  
26 3157063, at \*7 (citations omitted). The trustee under a deed of  
27 trust has only two duties: "(1) upon default to undertake the  
28 steps necessary to foreclose the deed of trust; or (2) upon

1 satisfaction of the secured debt to reconvey the deed of trust.”  
2 Lopez, 2011 WL 6029875, at \*13. As we discussed above, the  
3 Substitution of Trustee, the NOD, and the Notice of Sale complied  
4 with Cal. Civ. Code § 2924. Cal-Western satisfied its duty by  
5 taking the necessary steps to foreclose the DOT. As a result,  
6 the Debtor did not allege sufficient facts to demonstrate a cause  
7 of action for professional negligence.

8 **VI. CONCLUSION**

9 The Debtor stated his first four claims for relief were “in  
10 essence one claim stated as different theories related to the  
11 wrongful foreclosure.” Appellant’s Opening Br. at 6. For the  
12 foregoing reasons, we determined that the Debtor failed to allege  
13 that the foreclosure violated applicable California law and was  
14 improper. Consequently, the Debtor’s first, second, third, and  
15 fourth claims for relief were properly dismissed. The Debtor’s  
16 fifth claim for relief has been abandoned. Furthermore, we  
17 determined the Debtor’s sixth claim for relief was also properly  
18 dismissed. Accordingly, we AFFIRM the bankruptcy court’s  
19 Judgment of Dismissal that dismissed the adversary proceeding  
20 with prejudice.